IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 488

UNITED STATES OF AMERICA, *Appellant*

v.

RAYMOND J. WISE, *Appellee*

On Appeal From The United States District Court For The Western District of Missouri

MOTION TO AFFIRM

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MOTION TO AFFIRM

The appellee, Raymond J. Wise, moves that the judgment of the district court, dismissing as to him counts 11 and 12 of the indictment, be affirmed pursuant to Paragraph 1(c) of Rule 16 of the Revised Rules of this Court.

Statement

The district court dismissed as to the appellee two counts of a 15-count antitrust indictment, holding that conduct by an individual acting for a corporation in a representative capacity is not subject to the criminal penalties of the Sherman Antitrust Act. (26 Stat. 209, 15 U.S.C. § 1)The opinion of the district court is reported at 196 F. Supp. 155.

The court acted only after the Government had conceded in a bill of particulars that the appellee had been indicted solely for things allegedly done in his capacity as an officer of the defendant National Dairy Products Corporation. (J.S. 4)[1] It held that such conduct is completely covered by the criminal provisions of Section 14 of the Clayton Act. (J.S. App. A 20-23) The Government having disavowed any reliance upon Section 14, however, the court stated that dismissal under these counts was the only appropriate course.[2] (J.S. App. A 26)

The Government's grounds for appeal present no substantial or important question for review. No gap in the coverage of the criminal sanctions of the antitrust laws as a whole has been created by the district court decision, for Section 14 of the Clayton Act is fully available to cover charges of the

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[1] The abbreviation, "J.S.", is used herein for citation to the Jurisdictional Statement filed by the Government. The abbreviation, "J. S. App.," refers to the Appendix to the Jurisdictional Statement, which contains the opinion and order of the district court in this case. The opinion of the district court is reported at 196 F. Supp. 155.

[2] The appellee was also indicted in one count and his employer, National Dairy Products Corporation, was indicted in seven counts for alleged violation of Section 3 of the Robinson-Patman Act. The district court dismissed these counts on the ground that Section 3 is unconstitutional. This dismissal is the subject of a separate appeal by the Government in No. 173, this Term. No dismissal has been ordered of other counts charging National Dairy Products Corporation with violation of the Sherman Act, and the case is still pending on these counts in the district court.

type dismissed. The Government asserts further that it can reinstate the charges against this appellee simply by filing another indictment or information. (J.S. 18, note 11) No conflict in statutory interpretation exists among lower federal courts. Three different district courts, the only courts to rule upon the question, have recently held the Sherman Act inapplicable to corporate officials acting in their representative capacity.

The Jurisdictional Statement attempts to overturn these decisions by an extended argument of legislative intent based largely upon the remarks of one Congressman on the House floor in the debates on Section 14 in 1914, and upon an unwarranted interpretation of a few earlier cases on other points. The following argument includes a brief presentation of legislative and case material to make it clear that the district courts' decisions rest upon a firm historical, as well as legal, foundation. But it is appellee's primary position, set forth under point 1 of the Argument, that the meaning of the language of the statutory provisions involved is so clear as to warrant summary affirmance and to make resort to legislative history and extended argument unnecessary.

Argument

1. The charges made against appellee clearly are governed by the express terms of Section 14 of the Clayton Act, and do not come within the terms of the Sherman Act. Accordingly, the district court's decision may be affirmed on the basis of the plain meaning of the statutes involved. The indictment charged that appellee had "authorized or ordered to be done some or all of the acts alleged . . . to have been done by National." (Counts 11 and 12, Par. 75 and 83) In its bill of particulars, the Government made it clear that while appellee was "personally" charged with participation in the alleged illegal acts of his employer, he was at the time "acting solely in his capacity as an officer, director, or agent who authorized, ordered, or did some of the acts constituting in whole or in part the violations alleged also to have been committed" by the corporation. (J.S. 4)

The charges are thus a virtual copy of the language of Section 14 of the Clayton Act. Furthermore, not only does Section 14 cover the alleged conduct, but in plain language the section provides that when conduct of this kind occurs it is to be punished as prescribed in that section. No authority is granted for proceedings under the Sherman Act. Section 14 states:

> "Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual direc-

> tors, officers, or agents of such corporation who shall have *authorized, ordered,* or *done* any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court." (38 Stat. 736, 15 U.S.C. § 24; emphasis supplied)

In contrast, the Sherman Act contains no provision governing the criminal responsibility of persons who act on behalf of corporate defendants. Section 1, the substantive section relied upon by the Government, merely provides that every "person" who shall "make" an illegal contract or "engage in" any illegal combination or conspiracy shall be punished as described. When in Section 8, the Sherman Act gives its only definition of "person," it omits any reference to persons acting for a corporation in a representative capacity. Congress simply did not cover such corporate representatives in the Sherman Act.

It is the corporate principal, and not its employee, which "makes" contracts or "engages in" combinations of the kind referred to in Section 1. An agent or representative who merely acts for a disclosed corporate principal as to a contract is obviously not a party to the contract, and in legal contemplation is not one who "makes" the contract. For the same reason, one who represents a corporation in a combination or conspiracy does not thereby "engage" in the

conspiracy in a legal sense. To hold that he does would encounter the additional objection of being contrary to the general rule that a corporate employee is legally incapable of conspiring with his own corporation where he acts within the scope of his employment. *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F. 2d 911, 914 (5th Cir. 1952); *Goldlawr, Inc.* v. *Shubert*, 276 F. 2d 614, 617 (3d Cir. 1960); *Marion County Co-op. Ass'n.* v. *Carnation Co.*, 114 F. Supp. 58, 62 (W.D. Ark. 1953). This rule was recognized before the passage of Section 14, *Union Pacific Coal Co.* v. *United States*, 173 Fed. 737, 745 (8th Cir. 1909).

That Congress understood that the Sherman Act does not reach corporate representatives is clearly shown by a report of the Judiciary Committee of the House of Representatives in 1900, 10 years after passage of the Sherman Act. The committee stated:

> "Section 8 of the present law [Sherman Act] did not include in the definition of 'person' or 'persons' the agents, officers, and attorneys of the corporations and associations referred to, and their action as such agents, officers, and attorneys did not subject them to any penalties under the law . . . ." (H. Rep. No. 1506, 56th Cong., 1st Sess., May 16, 1900, 2)

Although a bill to amend the Sherman Act to cover corporate agents was reported by the Judiciary Committee in 1900 and was passed by the House, it failed to pass the

Senate. (33 Cong. Rec. 6502) Again in 1914, before it passed the Clayton Act, Congress had before it a proposal to subject corporate representatives to criminal liability under the Sherman Act by providing that anyone who "shall aid or abet" an antitrust violation shall be himself guilty of that violation and punishable accordingly.[3] This proposal failed and Congress chose instead the separate treatment of corporate officials provided in Section 14 of the Clayton Act.

This decision by Congress, expressed in plain language, requires the prosecution of cases such as the present one under Section 14, and not under the Sherman Act. As the lower court said:

> "This interpretation is supported by the wording and legislative history of Section 14, and is in accord with the fundamental principle that courts are bound to give effect to the various sections of legislation and should avoid a construction which would render a statute a nullity. Any other interpretation would leave Section 14 without content or force." (J.S. App. A 23; 196 F. Supp. at 157)

The last-quoted sentence is of particular significance. The theory for which appellant contends would leave no room for operation of Section 14, and under well-established rules is a construction to be avoided.

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[3] The proposal was submitted by Representative Volstead, 51 Cong. Rec. 9609, 9676, and after full deliberation was specifically rejected by the House, 51 Cong. Rec. 9678, following which Section 14 was adopted the same day, *id.* at 9682. (63rd Cong. 2d Sess., 1914)

This Court in direct reliance upon the statutory language has recognized explicitly that the appropriate statutory basis for prosecution of cases such as the present one is Section 14 of the Clayton Act. In *Hartford-Empire Co.* v. *United States*, 323 U.S. 386 (1945), a civil case under the Sherman Act, certain individual defendants were found to have "offended against the antitrust laws by acting on behalf of, or in the name of, a corporate defendant." The Court held it unnecessary to include these individuals in the injunction because they had acted only in a representative capacity and were not shown to have had any personal interest in the subject-matter of the violations. With regard to criminal responsibility, however, the Court stated:

> "That these individuals may have rendered themselves liable to prosecution by virtue of the provisions of § 14 of the Clayton Act is beside the point, since relief in equity is remedial, not penal." (323 U.S. at 434-5)

2. The three district courts which have passed upon the issue in this case have agreed that the Sherman Act does not apply to the conduct charged, and that the controlling provision is Section 14 of the Clayton Act. In the present case, the District Court, by Judge Smith, held:

> "Under clear Congressional interpretations, the Sherman Act governs the prosecution and punishment of principals, i.e., corporations and individuals acting on their own behalf, while Section 14 of the Clayton Act covers the prosecution and punishment of individuals

who, as corporate officials, took part in the corporate violation." (J.S. App. A 22-23; 196 F. Supp. at 157)

The District Court for the District of Columbia has reached the same conclusion. In *United States* v. *A. P. Woodson Co.* (Crim. No. 375-61, D. D.C., Sept. 21, 1961), CCH, 1961 Trade Cases ¶ 70,112, the court ordered dismissal of Sherman Act charges against certain corporate officials who were charged solely in a representative capacity. Judge McLaughlin endorsed the opinion of Judge Smith in the instant case, and stated:

". . . [T]he Court is of the opinion that the legislative history of the Sherman Act clearly reveals that Congress intended it to apply exclusively to corporate trusts and individuals acting in their individual capacities. The Court is also of the opinion that Section 14 of the Clayton Act was intended to be the exclusive remedy against corporate officials acting in their corporate capacities and not, as contended by the Government, a mere supplement to an existing remedy under the Sherman Act." (CCH, 1961 Trade Cases at p. 75,377)

Also, the District Court for the Eastern District of Wisconsin has recently made the same holding in *United States* v. *American Optical Co.* (Crim. No. 61-CR-82, Nov. 3, 1961), (unreported), reprinted in the Appendix attached to this motion. Ordering dismissal of a Sherman Act indictment as to two corporate officials, Judge Tehan in an oral opinion stated:

"It is our conclusion that Sections 1 and 2 of the Sherman Act were intended to govern prosecution of

> corporations and individuals acting in their own behalf, and that officers of corporations charged with performing acts in their representative capacities, even though charged "personally," cannot be prosecuted under those sections, but must be prosecuted under Section 14 of the Clayton Act." (Appendix, *infra* App. 5)

As the above courts held, there have been no contrary decisions which have ruled directly on the question presented since the enactment of Section 14. In its Jurisdictional Statement (J.S. 15), the Government states that three district court cases since passage of Section 14 in effect have sustained the propriety of Sherman Act charges against corporate officers despite having Section 14 called to their attention, *viz.*, *United States* v. *National Malleable & Steel Castings Co.*, 6 F. 2d 40 (N.D. Ohio 1924); *United States* v. *General Motors Corp.*, 26 F. Supp. 353 (N.D. Ind. 1939); and *United States* v. *Atlantic Commission Co.*, 45 F. Supp. 187 (E.D. N.C. 1942). It is clear, however, that none of these decisions involved the issue in this case, and none constituted a holding that the Sherman Act applies to conduct of corporate officials which is solely representative.

In the *National Malleable* case, the district court avoided ruling on the question, referred to both statutes and did not specify upon which it sustained the indictment. It is noteworthy that in a case growing out of the same indictment, the Court of Appeals for the Sixth Circuit, in *Meehan* v. *United States*, 11 F. 2d 847, 850 (1926), interpreted the

indictment as intending to lay charges under Section 14. The same interpretation of the same indictment was also made by a district court in *United States* v. *Mathues*, 6 F. 2d 149, 153 (E.D. Penn. 1925).

In the *General Motors Corp.* case the court was ruling on a claim that the indictment was duplicitous, and it said that the indictment of the corporate officers there involved was properly based on the Sherman Act because it did not mean "that their conduct as such officers is complained of, but rather they are charged as individuals." The court thus rested on the clear distinction between individuals who act on their own behalf, and who are then subject to the Sherman Act, and those who act in a representative capacity. (26 F. Supp. at 355) And in the *Atlantic Commission* case, the court rejected a duplicity objection for similar reasons, relying for authority upon the *General Motors* case (See 45 F. Supp. at 195), and thus evidently resting on the same distinction.

Inconsistently, the Government attempts to make a virtue of the very lack of modern decisions to support its position. It points out that there have been "dozens of indictments" of corporate officials under the Sherman Act over the years without regard to the existence of Section 14; it has indicted under Section 14 only once; no question was raised before in any way except in the three cited cases; and only now is it encountering opposition on this point. (J.S. 14-15) All

that is signified by this lack of prior attention to the issue is that the distinction between the two substantive offenses has been obscured by the Government's established practice of ignoring Section 14, and by the fact that the penalty for violation of the two sections was the same until 1955, when the maximum fine under the Sherman Act was raised to $50,000 while the fine under Section 14 was left at $5,000. Now that the issue is finally raised and brought into sharp focus, the Government should be permitted to gain nothing from the fact that the issue has been overlooked by both it and earlier defendants. As the court below said, this "is of little significance." (J.S. App. A 22; 196 F. Supp. at 157)

The only other cases urged by the Government in support of its position are five district court decisions all of which were very early in Sherman Act history. (J.S. 7-9) Whatever may be claimed as to the holdings in these cases, they have no force today because all were decided before Congress took the matter in hand for the first time and directly legislated upon it. But in any event, none of them holds that corporate officials acting solely in a representative capacity are indictable under the Sherman Act. All that can be derived with certainty from these cases is that persons who were also corporate officials could be indicted under the Sherman Act where they had utilized the corporate form as a cover to further their own personal interests.

In three of the cases, the corporations were not even indicted: *United States* v. *Winslow,* 195 Fed. 578 (D. Mass.

1912); *United States* v. *Swift,* 188 Fed. 92 (N.D. Ill. 1911); and *United States* v. *Patterson,* 201 Fed. 697 (S.D. Ohio 1912). In one, *United States* v. *New Departure Manufacturing Co.,* 204 Fed. 107 (W.D. N.Y. 1913), no issue pertinent to this problem was raised. In the fifth, *United States* v. *MacAndrews & Forbes Co.,* 149 Fed. 823 (S.D. N.Y. 1906), the corporation was convicted and the officers were acquitted, a result completely inconsistent with the Government's contention. (CCH, Federal Antitrust Laws, Summary of Cases, 1890-1951, Case No. 34) Further, this case and the *Winslow* and *Swift* cases have been construed in the past by the Government itself as charging the individuals with action on their own behalf and not merely in a representative capacity. This construction was adopted when the Government was much closer in time to these cases than it now is, and saw them as we do now, and not as it does now. In the appeal to this Court in the *Winslow* case in 1913, the Solicitor General's argument is summarized in the official report as including the following statement:

> "Individuals are subject to indictment for acts done under the guise of a corporation where the individuals personally so dominate and control the corporation as to immediately direct its action. *United States* v. *Swift,* 188 Fed. Rep. 92, 98; *United States* v. *McAndrews & Forbes Co.,* 149 Fed. Rep. 823. . . ." (*United States* v. *Winslow,* 227 U.S. 202, 204)

Thus, there is no controlling case support for the Government's present position, either before or since 1914. Instead,

the cases have recognized over and over, and with past support from the Government itself, the distinction expressly adopted in the instant case by the lower court, between individual action for personal purposes, indictable under the Sherman Act, and individual action in a representative capacity, indictable under the Clayton Act.

3. The legislative history of Section 14 of the Clayton Act shows that Congress did not consider corporate representatives to be covered by the Sherman Act, and that Congress intended to have their liability governed by Section 14. The Government has relied almost completely upon isolated remarks by one Congressman, Mr. Floyd, in floor debate in the House to attempt to show Congressional belief that the problem was already covered by the Sherman Act. (J.S. 10-14) But Congressman Floyd believed that new legislation was badly needed and there would have been little basis for his belief if he shared the Government's present view of the Sherman Act. While some of his statements in debate are ambiguous, his remarks may be interpreted as sharing the view that the Sherman Act reached acts done by corporate officials acting in their individual capacity, but not acts which were purely in a corporate capacity. Thus, he stated:

> "But if the individual *independently* had violated the Sherman law and was guilty of violation of it in any way *as an individual,* he could be convicted without ever convicting the corporation. . . . (51 Cong. Rec. 9679; emphasis supplied)

Irrespective of the interpretation of Congressman Floyd's remarks, the Government argument ignores the fact that Congress obviously believed at the very least that there was such a major problem with Sherman Act coverage as to require complete new legislation on the subject. Congress obviously intended to chart the future by taking the whole subject into the comprehensive, specific jurisdiction of Section 14, and there is no legislative history, cited by the Government or otherwise, which establishes any other intention.

The Jurisdictional Statement has ignored the plain language of the statutes, whereas this language is of primary importance in determining the issue. Nevertheless, the legislative history, as evidenced by the Committee Reports of both the House and the Senate fully supports the lower court decision.

The original version of Section 14 appeared as Section 12 in the Clayton Bill. (H.R. 15657, 63rd Cong. 2d Sess. 1914) The report of the House of Representatives Committee on the Judiciary accompanying the bill described the section as follows:

"PERSONAL GUILT.

> "Section 12 is the personal guilt provision of the bill. It provides that whenever a corporation shall be guilty of a violation of any of the provisions of the antitrust laws the offense shall be deemed to be also that of the individual officers or agents of such corporation,

> and upon the conviction of the corporation, any director, officer, or agent who shall have authorized, ordered, or done any of such prohibited acts shall be deemed guilty of a misdemeanor and upon conviction therefor shall be punished *as prescribed in the section.*" (H. Rep. No. 627, 63rd Cong. 2d Sess. (1914) 20; emphasis supplied)

The Senate Judiciary Committee's report on its version of Section 14, which was substantially similar in all material respects to the House version, was even more explicit that the new law would be relied upon to establish and to govern the liability of corporate officials. The Report stated:

> "Existing antitrust acts are further supplemented by a provision that whenever a corporation shall violate the antitrust acts such violation shall be regarded as that also of the individual directors and officers of the corporation who shall have authorized, ordered, or committed any of the acts constituting such violation, *thus fixing the personal guilt of the officials of the corporation who are responsible for the infraction of the law.*" (S. Rep. No. 698, 63rd Cong. 2d Sess. (1914) 1-2; emphasis supplied)

The following statement of Senator Culberson, Chairman of the Senate Judiciary Committee and spokesman for the Clayton bill in the Senate, should remove any possible doubt as to the intent of Congress:

> "What I mean to say is this: Heretofore, under the Sherman Act, if a corporation were guilty of a violation of that Act, the guilt of that corporation would not be

> visited upon the individual director or agent or officer who authorized or committed or induced the act. This section is intended to supply that deficiency and to visit upon the officers and agents of the corporation responsible for the conduct punishment for the act of the corporation." (51 Cong. Rec. 14324)

The Government attempts to explain the enactment of Section 14 on the theory that it merely added to an existing Sherman Act coverage of corporate representatives by reaching persons who "had not personally and directly participated in the corporate violations," or whose conduct "was not sufficient to make them parties to the illegal conspiracy." (J.S. 7) This argument offers no explanation for the fact that in Section 14 Congress expressly covered any official who has "authorized, ordered or *done any of the acts constituting in whole* or in part" the corporate violation. (Emphasis supplied) Thus Congress covered officials who, on behalf of the corporation, do all of the things constituting the corporate violation, thereby legislating on the same activities now claimed by the Government to have been covered already by the Sherman Act. Further, no illustration of the asserted difference is given, and since the Department of Justice has only once in 47 years resorted to Section 14, it appears that the section has not heretofore been thought by the Government to have the broader quality now suggested.

The Jurisdictional Statement attempts to find support in the fact that in 1955 Congress raised the maximum fine for violations of the Sherman Act to $50,000 but left the maxi-

mum fine for violations of Section 14 at $5,000. This action of Congress in directly differentiating between the two statutes is completely contrary to the Government's position here. Congress certainly cannot have intended to provide for two radically different criminal penalties for the same conduct, leaving it to the complete discretion of the prosecution to disregard the lower penalty and seek always the higher. Yet the Government argument attributes to Congress this unreasonable intention. And it is the effort to obtain a higher maximum penalty than that expressly provided by Section 14 that, according to the Jurisdictional Statement, provides the principal reason for this appeal. (J.S. 6 and 18, note 11) Even the testimony by a representative of the Department of Justice, which is cited in the Jurisdictional Statement (J.S. 17), contains no express statement of the views now advanced by the Government, and it was given in 1950, five years earlier than the amendment to the Sherman Act. But even if the testimony did contain such an express statement, it would represent nothing more than the argument which has now been rejected by three district courts.

4. The Government makes a brief suggestion that affirmance of the trial court decision would create difficulty in administering the law, but the details of this suggestion are confined to a footnote. (J.S. 18, note 11) The note states that there would be additional work in filing superseding indictments, trial complexities which are totally unspecified, and a lower maximum fine. These reasons do not touch

the merits and certainly furnish no basis for denying the Motion to Affirm. The fact that the Government does not wish to be limited to a maximum penalty of $5,000 provides no ground against affirmance. Congress has chosen to limit the fine for corporate officials acting in a representative capacity to that amount and its intention controls, not the wishes of the Government.

Conclusion

The appeal presents no substantial legal issue or question of practical importance to antitrust enforcement. The judgment of the trial court should be affirmed summarily.

Respectfully submitted.

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November 10, 1961.

APPENDIX

In the United States District Court for
the Eastern District of Wisconsin

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AMERICAN OPTICAL COMPANY, an Association; AMERICAN OPTICAL COMPANY, a Corporation; BAUSCH & LOMB, INCORPORATED; VICTOR D. KNISS; and ALTON K. MARSTERS, *Defendants*.

No. 61-CR-82

TRANSCRIPT OF PROCEEDINGS UPON ORAL DECISION, NOVEMBER 3, 1961

THE COURT [By Judge Tehan]:

* * *

On August 1, 1961, a two count indictment was returned by the grand jury charging the defendants, American Optical Company, an Association, American Optical Company, a corporation, Bausch & Lomb, Incorporated, Victor D. Kniss, executive vice-president of American Optical Company, a corporation, and a trustee of American Optical Company, an Association, and Alton K. Marsters, vice-president of Bausch & Lomb, with violations of Sections 1 and 2 of the Sherman Act.

The individual defendants have each filed a Motion to Dismiss, both asserting the ground that the indictment complains only of alleged action and conduct performed by them in their representative capacities, and does not therefore set forth any violation of Section 1 or 2 of the Sherman Act.

The moving defendants contend that "Indictments under Sections 1 and 2 of the Sherman Act can not impose criminal responsibility on corporate officials charged only with authorizing, ordering or doing the corporate violations, inasmuch as such conduct is covered by Section 14 of the Clayton Act."

Substantially, the same contention was advanced successfully in the recent cases of *United States* v. *National Dairy Products Corp.* (W.D. Mo.) and *States* v. *A. P. Woodson Co.* (Dist. Col.)

In the *National Dairy* case, the court held that an individual charged solely in his representative capacity and not in any degree on an individual basis for his own personal account cannot be charged with violating Section 1 of the Sherman Act, stating that the Sherman Act governed prosecutions and punishment of corporations and individuals who, as principals, act in their own behalf, and Section 14 of the Clayton Act covered prosecution and punishment of individuals, who, as corporate officials, took part in corporate violations.

In the *Woodson* case, a motion of individual defendants, corporate officials, to dismiss an indictment returned against them under Section 3 of the Sherman Act was granted, the court there holding also that since those defendants were charged with doing acts as corporate officials, in their representative capacities, they could not be prosecuted under Section 3 of the Sherman Act, the Government's exclusive remedy against them being under Section 14 of the Clayton Act.

The Government does not attempt to distinguish the case at bar factually from the *National Dairy* or *Woodson* cases. An examination of the indictment convinces us, and the Government appears to agree that here, too, the moving defendants are charged only with actions and conduct

performed in their representative capacities. Thus on Page 3 of its brief in opposition to the defendants' Motions to Dismiss, the Government states:

> "The indictment shows on its face that they (being the moving defendants) are charged with having conspired with each other while acting as officers of the defendant corporations. The indictment does not charge the guilt of the individuals as being imputed to them from the guilt of the corporation. Instead, it charges each individually and personally is guilty of conspiring in violation of the Sherman Act while functioning as an officer of the defendant corporation."

In this respect, it must be found that this case is identical to both the *National Dairy* and *Woodson* cases.

We are in complete agreement with the holdings of the United States District Courts for the Western District of Missouri and the District of Columbia in the *National Dairy* and *Woodson* cases, and with their reasoning on their arguments therein advanced, and therefore see no purpose in elaborating on or restating that reasoning. It is our intention to discuss today only the argument which, according to the Government, was made to neither court. This argument relates to the purpose for which the sections here involved were enacted, and results in the rather bizarre conclusion that under Sections 1 and 2 of the Sherman Act, corporate officers who, while acting in their representative capacities, knowingly participated in, performed or authorized acts violative of those sections could be prosecuted therefor, while under Section 14 of the Clayton Act, when a corporation was found to have violated the Sherman Act, any officer, agent, and the like, of that corporation could be prosecuted for performing any act, however innocent, "which entered into and formed a part

of the conviction of the corporation." That is on Page 19 of the Government's brief.

We agree with counsel for the defendants' summation that under this theory, knowingly, illegal and or conspiratorial acts are punishable under the Sherman Act, while Section 14 was enacted to reach and punish innocent actors who, in performing their innocent acts, furthered their corporation's violation. Understandably, we believe, we cannot accept this argument. To state it is to refute it. Neither does it appear that the argument is new. In the *Woodson* case, 1961 Trade Cases Paragraphs 70,112, the court stated at Page 75,377:

> "The Government in its argument raised two points which were not presented in National Dairy. The first concerns the claim that Section 14 was intended to supplement the Sherman Act by 'facilitating the punishment of top echelon corporate officials who did not participate in anti-trust violations to an extent sufficient to be a conspirator under the Sherman Act.' Memorandum in Opposition, pg. 7. The Government contends that the Sherman Act makes no distinction between corporate officials who are acting in their corporate capacities and those acting solely in furtherance of their individual interests. Its argument is to the effect that Section 14 sought to reach those persons whose acts standing alone might be absolutely innocent, but which contributed in whole or part to the violation by the corporation. The distinction the Government appears to be advocating is that the Sherman Act applies to officers acting in their corporate capacities who actually perform acts constituting a violation of the law while Section 14 of the Clayton Act is applicable only to those officers acting in their corporate capacities who, although authorizing and directing such acts, cannot be reached under the Sherman Act because such acts are too remote."

We find no merit to the Government's position that Section 14 of the Clayton Act imputes a corporation's guilt to any officer, and the like, of the corporation performing any act relating to the crime of the corporation.

The Government has also argued that no individual can be charged under Section 14 of the Clayton Act until the guilt of the corporation for which he acted has been established, that is, that both the corporation and its officers could never be charged in the same indictment if Section 14 alone applied to officers acting in their representative capacities. This argument has no bearing on the question of whether the moving defendants herein are properly charged.

It is our conclusion that Sections 1 and 2 of the Sherman Act were intended to govern prosecution of corporations and individuals acting in their own behalf, and that officers of corporations charged with performing acts in their representative capacities, even though charged "personally," cannot be prosecuted under those sections, but must be prosecuted under Section 14 of the Clayton Act.

The motions of the defendants, Victor D. Kniss and Alton K. Marsters, to dismiss the indictment as to them are therefore granted.

* * *